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Making Government Work: A Proposed Amendment to State Constitutions

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Too often, government officials act out of a desire to improve things without any clear idea of how that improvement might be accomplished, or even a clear notion of what “good” they are pursuing. This is especially true when a legislature, even one where all its members agree, with one definition of “good” in mind delegates broad powers to agencies whose leaders’ definition may differ. If the road to hell is paved with good intentions, consider government the devil’s best contractor. Elected government officials may be the world leader in good intentions, but very rarely do citizens get a clear picture of the results of those intentions.¹

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Citizens are supposed to be the ultimate source of authority in the United States, and their definition of “good,” as recognized and interpreted by legislators, ought to control.² Our founders ensured that ordinary citizens, not an elite aristocratic class, would set up, run, and compose the government. They instituted elections so citizens could set the general direction of the government, and oversee the officials who run it day-to-day.³ However, government has grown so big, with fingers in so many pies, it is impossible for any one person to keep track of every program. Legislators have decided that they should choose the general direction of the government and delegate those pesky day-to-day decisions to administrative agencies. Our good intentions have run amok and birthed a leviathan. As things currently stand, even legislators, who are part-time in most states, cannot possibly oversee every

agency they and their predecessors have created.⁴

This proposal seeks to answer two questions: are government bodies pursuing the right “good,” and are they any good at it? The proposed state constitutional amendment (below) would give legislators a tool to guide and evaluate agencies, and give voters a tool to evaluate elected representatives based on results, rather than mere intentions.

The goals of the amendment are threefold: first, to force legislators to articulate a particular outcome they hope to achieve through any legislative action; second, to create limits on agency actions, since the agencies must act in a way consistent with these goals; and third, to give taxpayers metrics by which to measure government programs.

Programs that consistently fail to meet expectations ought to be reformed or ended. This will only happen when voters pressure lawmakers. The governor’s annual report, as specified in the amendment, will provide voters with shorthand information about the productivity of government programs. Once voters and legislators grow used to the metrics, their use might be expanded. Programs consistently doing their jobs may see funding increased, while those failing programs might be reduced or eliminated.

The model amendment contains four sections. The first section requires the legislature to create a mission statement covering every dollar the state spends. The second section requires the legislature to assign each spending program a way to measure its effectiveness. The third section provides consequences for any agency, board, or commission not in compliance, including stripping them of funding until they are compliant. Funds for the time they were noncompliant are permanently lost, and put in the state’s rainy day fund. The fourth section allows a supermajority of the legislature to exempt a particular agency from the second section.

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Mission Statements

The first section of the amendment requires that every dollar spent by the state have a mission statement attached to it. Since the legislature is directly accountable to the electorate, they are the proper body to create mission statements. This forces legislators to carefully consider the ends they hope to achieve. It also gives the agency, board, or commission a lodestar, and gives judges a way of ensuring the agency's actions are in line with the mission the legislature set for them. Since the mission statement is part of the law, there is no concern over judges making policy by trying to "guess" what the legislature wanted.⁵ It will be right there in the statute.

Mission statements for every agency ought to exist already. When taxpayers are footing the bill, it should be very easy for them to know what they are paying for. A mission statement, written into law, makes it indisputable. While the effectiveness of particular measures may be disputed, the mission statement provides a baseline.⁶ Most citizens, even the politically engaged ones, likely do not know of the vast majority of agencies, boards, and commissions that exist. Upon learning of an agency's existence, it should be easy for a citizen to look up what that agency was created to accomplish.

Measurable Goals

The second section of the amendment requires that every dollar spent by the state have a measurable goal attached to it (except as provided in the fourth section, detailed below). Since the legislature is directly accountable to the electorate, it is the proper body to create measurable goals. This forces legislators to carefully consider the steps appropriate to accomplish what they hope to achieve. It also gives the agency, board, or commission a roadmap, and gives voters a way of ensuring the agency's actions actually serve the mission the legislature set for them. Since the measurable goal is part of the law, there is no concern over bureaucrats or politicians misleading voters by trying to change what the legislature wanted. It will be right there in the statute.

In selecting these measures, it is important that the legislature not allow agencies to measure what they already do, but rather what they are actually accomplishing.⁷ It does not matter if the state medical board licenses thousands of new doctors. If those new doctors provide competition for existing doctors and lower the cost of treatment for the average Oklahoman, *that* would be worth talking about. Schools cannot talk about their graduation rate, since it is easily (and routinely) manipulated through social promotion.⁸ Instead, schools should measure the number of students who are at or above grade level in reading, math, and science. These are the fruits of their labors, the accomplishments upon which their reputations should rest.

The Governor's report is the most important element of the entire amendment - it could reasonably be called the living embodiment of the amendment's measurable goal. It would give quick information to engaged citizens and government watchdogs. Anyone interested could find a list of every program government funds, a summary of what each one does, and useful data about how well it does it.

Enforcement

The third section of the amendment provides three

enforcement mechanisms. The first is that a responsible state officer, to be defined prior to enactment, is required by law to seize any assets from any agency that does not have a statutorily defined mission by the implementation date. This puts pressure on the legislature to actually do the work of creating missions. The amendment also specifies two ways the funds may be spent, and ensures that agency employees are not compensated for time when their agency was not in compliance. This creates a class of political insiders demanding the legislature take seriously the mission statements and measurable goals.

The second enforcement mechanism is the courts. The amendment explicitly allows certain government officials to sue to enforce the amendment. Courts can order the appropriate government officials to act, to refrain from certain action, and to compensate wronged citizens if the provisions of the amendment are not followed. So a judge could order the responsible government official to seize the funds of a noncompliant agency.

Courts are specifically authorized to look at the mission statement covering the agency or expenditure to determine whether the measurable goal is sufficiently connected with the good the agency is supposed to be pursuing. They can also look at the mission statement to help determine if a given agency action is allowed by the law that governs the agency. For instance, if the department overseeing public health attempted to interfere with private contracts between landlord and tenants, the court could see that such an action was well beyond the scope of the agency's mission, and choose to continue ordering evictions of nonpaying renters. Defendants in an action brought by a government entity can raise violations of the amendment as a defense - whether it be that the agency is reaching beyond the bounds of its mission, or that it was noncompliant with the amendment when it created the rule or began prosecution of the violation. Since some agencies refer violators to the Attorney General's office for prosecution, it is important to include "a relevant agency," lest the AG's compliance with (or exemption from) the amendment be deemed sufficient to cure the referring agency's noncompliance.

The third, and most important, enforcement mechanism is the informed voter. The goal of the amendment is to give voters improved information, in a shorthand format that will help them see how their government is spending money, what it is trying to accomplish, and how successful it is. It should make it easier for everyone to see what programs are worth their price and which ones should be reformed or eliminated.

Exceptions

The final section of the amendment creates a path for legislators to exempt particular agencies from requirements outlined in section two of the amendment. This is a recognition that there are some benefits government can provide that defy measurement. Public safety may be one such measure. True, government could make the public safer by lowering speed limits to 15 miles per hour and arresting anyone who shows the slightest sign of antisocial behavior. That would make the community safer, but it would not make it *better*. Metrics like the percentage of reported crimes solved sound like good measurements at first, but once thought through, they can be seen to create perverse incentives.

The bar for exemption is intentionally set very high. While

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there are some benefits government can provide that defy measurement, most of the benefits government pursues *can* be quantified. Legislators may wish to avoid the voter accountability inherent in the amendment, lest it become clear that their intentions are not truly being served by their policies. There is also the problem of doing the initial work. Most state legislatures are part time, and they may wish to expedite the process.⁹ The fear is that the exemption provision could be used to streamline

the process. Requiring 60 percent of legislators plus the governor to agree that an agency should be exempt should be enough to prevent such abuses.

Conclusion

If the citizens are truly sovereign, that is, if the power to govern flows from the people, as the founders of this country believed, then power is only legitimately exercised if citizens can reasonably be expected to keep track of what their government is doing. As it currently stands, even someone who made it their full time job to understand everything a state does would have difficulty keeping up. The average voter has no hope. Giving voters shorthand information about what each part of government is trying to do, and how effective it is, restores some semblance of popular sovereignty, and gives citizens as well as their representatives the means to rein in unproductive areas of government. Good intentions can lead to bad policy, especially when those intentions become muddled. Measurable accountability can keep government off the path of good intentions.

An Amendment to Measure State Government Success and Ensure Accountability

1. Missions and Measurable Benefits for State Agencies and Expenditures

A. Establishing Missions and Measurable Benefits for New Agencies and Expenditures

Upon creation of any new state agency or expenditure, the Legislature shall provide a mission statement in the enabling statute, along with a list of measurable benefits, consistent with the mission statement as well as the constitutions and other applicable laws of the State of [state] and of the United States. Mission statements may be amended, by the ordinary processes of legislation, no more than one time every four years.*

B. Establishing Missions for Existing Agencies and Expenditures

The Legislature shall, by [date certain], define and codify in statute a mission for every state agency, board, commission, or other expenditure, whether created by statute, rule, or by the constitution of this state. Except as provided in Section 4, every dollar spent by the state shall pass through a state department with a mission statement. In establishing mission statements, a committee of each chamber of shall solicit and hear open public testimony, to be given under pains and penalties of perjury. Mission statements may be amended, by the ordinary processes of legislation, no more than one time every four years.

C. Agency Action Only Consistent with Legislated Mission

- 1) No state entity shall continue any program or endeavor that is inconsistent with its statutorily-defined mission.
- 2) A state agency shall not define its own mission.

2. Accountability

A. Except as provided in Section 4, the Legislature shall define one or more measurable goals, including metrics for tracking those goals, for every benefit contained in the mission statement prior to appropriating any funds to an agency or program. No monies shall be expended except where at least one measurable goal applies, except as provided in Section 4. A measurable goal is something that quantifiably demonstrates real world results of the program, and must be directly related to the improvements the program provides to the people of [State]. Measures of work volume or activity in an agency are not sufficient; the measurable goal must track the results and accomplishments of the agency. Measurable goals may be amended by the ordinary processes of legislation, no more than one time every four years.

B. The Governor shall cause to be published annually a single report stating the mission, measurable benefits, target goals, and actual results of each agency and spending program of state government.

3. Enforcement

A. The [responsible state officer**] shall seize all appropriated and unappropriated funds of any agency or program that:

- 1) Does not have a statutorily defined mission, measurable benefits, and target goals; or

* States may wish to set a starting date for this time period on the date of the next gubernatorial inauguration.

** The responsible state officer should be a gubernatorial appointee, either an existing officer or one newly created.

2) Fails to cooperate with the Governor's annual report as defined in Section.

B. Seized funds shall be placed in the state's rainy day fund. The agency shall not recover, allocate or spend the proportion of its budget covering the period when it was not compliant with this amendment.

C. The courts of this state shall have the power to enforce this amendment. The mission statement and measurable benefits shall constitute evidence of the legislative purpose of the agency or expenditure, if the text of the governing law is otherwise unclear. Defendants in any action or prosecution brought by a state entity may raise a relevant agencies' noncompliance with this amendment as a defense.

D. Violations of Sections 1 or 2 shall create a right of action for the following government officials, any of whom shall

have standing to sue for the enforcement this amendment: the Governor, the Attorney General, or a group of legislators comprising not less than ten percent of the full legislative body. Writs of mandamus, injunctions, and other appropriate remedies at law or equity shall be granted.

4. Exemption and Waiver

The legislature may waive, for a period not to exceed five years, the requirements of Section 2 for an agency or program which provides demonstrable benefit to the people of [state], but which good is not easily measurable or quantifiable. For any exemption, each house must hold a roll call vote, and a sixty percent supermajority must support the grant, renewal, or extension of a waiver. The Governor must approve the grant, renewal, or extension of any waiver, unless a seventy percent supermajority of each legislative chamber votes to override a Governor's veto of a waiver under this act.

End Notes

- 1 For example, in Oklahoma the state budget for fiscal year 2022 is 33 pages long, and provides only the name and total appropriation for each agency. Oklahoma HB2900, 2021 Session, <http://www.oklegislature.gov/BillInfo.aspx?Bill=hb2900&Session=2100>.
- 2 James Madison, Federalist No. 10, *The Federalist Papers*, available at <https://billofrightsinstitute.org/primary-sources/federalist-no-10>.
- 3 James Madison, Federalist No. 51, *The Federalist Papers*, available at <https://billofrightsinstitute.org/primary-sources/federalist-no-51>.
- 4 See e.g. James Broughel, *A Snapshot of Oklahoma Regulation in 2019*, Mercatus Center at George Mason University, February 2019, https://www.mercatus.org/system/files/broughel_-_policy_brief_-_a_snapshot_of_oklahoma_regulation_in_2019_-_v1.pdf.
- 5 Frank H. Easterbrook, "The Role of Original Intent in Statutory Construction," *Harvard Journal of Law and Public Policy* 11 No. 1 (1988): 59, https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2154&context=journal_articles.
- 6 Talmadge Heflin and Byron Schlomach, *Demanding Performance: Part I State and Agency Missions*, Texas Public Policy Foundation, August 2006, <https://files.texaspolicy.com/uploads/2018/08/16092119/2006-08-PP-demandperformancel-bsth.pdf>.
- 7 Michael R. Davis et al., *Ten Top Tens: State Rankings Worth Pursuing*, 1889 Institute, February 2019, <https://1889institute.org/ten-top-tens-state-rankings-worth-pursuing>.
- 8 Kathryn M. Doherty, "Social Promotion," *Education Week*, September 21, 2004, <https://www.edweek.org/leadership/social-promotion/2004/09>. See also: Grace Chen, "Is Social Promotion Crippling Our Children's Future? The Debate," *Public School Review*, September 30, 2019, <https://www.publicschoolreview.com/blog/is-social-promotion-crippling-our-childrens-future-the-debate>.
- 9 National Conference of State Legislators, *Full- and Part-Time Legislatures*, July 28, 2021, <https://www.ncsl.org/research/about-state-legislatures/full-and-part-time-legislatures.aspx>.